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Supreme Court, U.S.
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No. 93-1711

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BETTY ROUSH,
Petitioner,
v.
KFC NATIONAL MANAGEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether this Court should grant certiorari to address an alleged Seventh Amendment issue that was not mentioned by the parties, or by the Court below, which resolved this Age Discrimination in Employment case by ruling, as a matter of law, that an equitable award of front pay was not permissible?

(2) Whether the Court of Appeals erred in ruling that Petitioner's proof on the state law tort of outrage was legally insufficient, where Petitioner does not contend that the Court applied an incorrect standard for proof of outrage and where the formulation of that standard is entirely consistent with the formulation contained in the instructions given to the jury?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

Petitioner, a former employee of Respondent KFC National Management Company ("KFC"), brought claims against Respondent under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and Kentucky tort law of outrage.[1] After the case had been removed to the United States District Court for the Western District of Kentucky, it was set for trial before a jury in March, 1991.

The parties tendered proposed jury instructions to the Court in late February, 1991. Petitioner's proffered ADEA damage instruction would have permitted the jury

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[1] Pursuant to Rule 29.1, the Court is advised that Respondent KFC National Management Company is a wholly-owned subsidiary of PepsiCo, Inc., which is a publicly-owned corporation.

to award, *inter alia,* the "amount of . . . future lost salary to the date that you believe [Petitioner] will stop working in the future," and would have advised the jury that "[t]his instruction allows you to award . . . front pay, that is the payments [Petitioner] would have from the date of the trial until her retirement age." *See* Plaintiffs' Tendered Jury Instructions, No. B 12. The trial judge (the Honorable Thomas A. Ballantine, Jr.), however, rejected this instruction. Instead, the sole instruction that the Court gave the jury on the issue of ADEA damages spoke only in the past tense, calling for the jury to award "damages for lost income and benefits which she *incurred* as a result of her discharge." Trial Tr. at 563 (emphasis added).

The Court further instructed the jury that it should sustain the claim of outrage if Petitioner proved that Respondent "by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to her." *Id.*

At trial, evidence regarding the amount of ADEA damages was offered only by Petitioner, and consisted of testimony by Petitioner's accountant as well as Petitioner's own testimony as to her interim earnings, social security benefits, and retirement benefits. On appeal, Petitioner could point to no record evidence inconsistent with the fact that the back pay component of her proof of ADEA damages totalled precisely $24,386. The jury, however, returned an award for Petitioner of $100,000 on the ADEA claim, and an additional amount on the outrage claim.

Respondent moved for j.n.o.v. and/or for a new trial, contending, *inter alia,* that the ADEA damage award necessarily and improperly included a substantial "front pay" component. Respondent also argued that, because the record failed to establish conduct by Respondent that was a " 'deviation from all reasonable bounds of decency [or] utterly intolerable in a civilized community,' " Peti-

tioner had failed to satisfy the stringent requirements under Kentucky law for showing outrage. *See* Defendant's Memorandum in Support of Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at 8-9, 20-21 (*quoting Craft v. Rice*, 671 S.W. 2d 247, 250 (Ky. 1984)). Petitioner responded by contending that "front pay is not only proper, it is mandated"; and that "the conduct which [she had] endured . . . was consistent, long lasting, reprehensible, emotionally devastating, unacceptable in a civilized society, *was far outside the bounds of decency* and has physical as well as emotional impact." *See* Plaintiff Betty Roush's Response to Defendant's Motion for Judgment Notwithstanding the Verdict and New Trial, at 19, 30. (Emphasis added.)

U.S. District Judge Charles Simpson[2] denied KFC's request for post-trial relief on the ADEA damage and outrage issues. With respect to damages, the District Court ruled that "[f]ront pay, back pay, and various benefits identified could all properly be considered by the jury in reaching its verdicts," and accordingly upheld the award on the premise that "there is some basis in the record for the damage award." Pet. App. 26a. As for the outrage claim, Judge Simpson concluded that there had been legally sufficient evidence presented that KFC's conduct was "so extreme in degree as to go beyond all possible bounds of decency, to be regarded as atrocious and utterly intolerable in a civilized society." Pet. App. 28a.

Respondent appealed both rulings; the United States Court of Appeals for the Sixth Circuit reversed. With respect to the ADEA damages, the Court of Appeals observed that, under *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984), "determination of the propriety of an award of front pay is a matter for the court," in its "sound discretion." Pet. App. 10a.

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[2] Trial Judge Ballantine died before Respondent's post-trial motion had been decided.

Then, the Court of Appeals concurred with KFC that "the [damage] award must have included front pay, because even Roush's own evidence justified a back pay award totalling only $24,386." Pet. App. 8a. The Court of Appeals also agreed with KFC that the trial court's instructions to the jury had not authorized the jury to make an award of front pay. Pet. App. 10a. Further concluding that, "as a matter of law, front pay was not appropriate in this case," the Court of Appeals reversed and remanded for entry of judgment in the amount of $24,386, stating that it "could not condone the ex post facto determination made by the district court in this case" in "approv[ing] an apparent award of front pay by the jury" after having "previously refused to give a front pay instruction to the jury." Pet. App. 12a-14a.

The Court of Appeals also reversed the District Court's denial of j.n.o.v. on the outrage claim. *See* Pet. App. 14a-16a. After noting that "the standard for proving liability for this tort is particularly stringent," it then cited a requirement that, to show extreme and outrageous conduct, a plaintiff must establish that the defendant's conduct has gone "beyond 'all possible bounds of decency.'" Pet. App. 15a (citing *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990)). This "bounds of decency" language was essentially the same formulation of the relevant standard that had been set forth in the District Court's ruling on j.n.o.v., and it had been quoted approvingly in Petitioner's appellate brief. Applying the standard, the Court of Appeals concluded that Respondent's actions "[e]ven when considered in their totality . . . do not amount to 'extreme and outrageous conduct' justifying imposition of liability." Pet. App. 15a.

Armed with new counsel, Petitioner now seeks a writ of certiorari in this Court, contending for the first time that the Seventh Amendment prohibited the review and result afforded in the Court of Appeals with respect to

the ADEA damage award, and that the formulation of the legal standard used by the Court of Appeals in reversing the denial of j.n.o.v. on the outrage claim impermissibly conflicted with the formulation contained in the relevant jury instruction.

REASONS FOR DENYING THE WRIT

The Petition identifies two issues that Petitioner believes this Court may have some interest in resolving: whether the Seventh Amendment permits a Court of Appeals to review and remit a jury award previously deemed not excessive by the trial court; and whether an appellate court engaging in a review of the sufficiency of the evidence is bound by a legally erroneous jury instruction to which the defendant made no objection. But notwithstanding the ingenuity of Petitioner's new lawyers, these issues, and Petitioner's case, simply do not match. Despite the repackaging effort contained in the Petition, certiorari should be denied on the ground that the issues proffered are not clearly presented here and were never litigated below. If they are of interest, they deserve an appropriate case for deciding them. This is not that case.

With respect to the Seventh Amendment argument, Petitioner cites a number of very old decisions from this Court stating that trial court decisions denying motions for a new trial based on purported excessiveness of the verdict are not reviewable. Those cases, however, involved an attempt to have an appellate court reweigh the facts, not, as here, a reversal by a Court of Appeals for legal error. None of them, accordingly, suggests that the Seventh Amendment insulates the legal error committed by the trial court here—*i.e.*, failing to disallow the jury's front pay award—from the review and relief afforded below. Indeed, these cases affirmatively approve review of erroneous instructions and non-conforming verdicts. No Seventh Amendment issue was litigated below and none is implicit in the record.

Likewise, this case does not present the issue Petitioner seeks to raise concerning a deviation between the formulation of the legal standard used by the Court of Appeals in reversing the outrage award, and that used in the jury instructions. The formulations are not meaningfully distinguishable; indeed, Petitioner has implicitly acknowledged as much by using throughout this litigation the same formulation adopted by the Court of Appeals. The Court should leave the issue that the Petition attempts to raise for a case in which it is actually presented.

I. THIS CASE PRESENTS NO SEVENTH AMENDMENT ISSUE SUITABLE FOR REVIEW

Petitioner claims that certiorari should issue based on the Seventh Amendment question that this Court raised, but left open, in *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156 (1968), and *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955)—namely, whether an appellate court can review and remit a trial court's ruling upholding a verdict as not excessive. That issue, however, plainly is not presented by this case. Neither the parties, nor the Courts below, ever mentioned the Seventh Amendment in this litigation prior to the filing of the Petition, even though the review of the front pay award undertaken by the Court of Appeals could not have come as a surprise—the Court of Appeals' ruling afforded Respondent the precise result and relief it had sought in the appeal.[3]

As argued and decided below, this case is about the District Court's *legal error* in permitting the judgment to

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[3] *See* KFC's Brief 14 (contending that verdict should have been conformed to Judge Ballantine's jury instructions, which foreclosed an award of front pay); *id.*, 16 (asserting and demonstrating that "Roush's back pay can be precisely calculated from her own testimony and that of her expert as a total of $24,386"); KFC's Reply Brief 10 (stating that the evidence supports a back pay award of no more than $24,386 and that "The Court should order a specific reduction of $75,614").

include a front pay award. First, Respondent argued below, and the Court of Appeals agreed, that front pay is an equitable remedy and its availability is a question for the court, and not the jury, to decide. In so ruling, the Court below followed the approach uniformly taken by each of the judicial circuits to address the issue.[4] Not surprisingly, then, Petitioner does not challenge this holding that the threshold availability of front pay is a purely legal issue. Next, the Court of Appeals proceeded to apply this established rule on the availability of front pay to the particular facts at hand. Based largely on the fact that Petitioner quickly obtained another job at a comparable salary, the Court of Appeals held that, as a matter of law, no award of front pay was appropriate. Once again, Petitioner does not challenge this holding.

Thus, the Petition does not challenge either of the Court of Appeals' front pay holdings. Instead, in seeking to create a Seventh Amendment issue, the Petition contends that the Court of Appeals was powerless to review and rectify the trial court's front pay rulings once that Court had denied Respondent's post-trial motion, leaving the jury's verdict intact. It is hard to see how, in addressing the purely legal issue of eligibility for front pay, the Court of Appeals could possibly have created a Seventh Amendment issue. And, indeed, none of Petitioner's authorities even remotely suggest that a refusal to grant post-trial relief erects a constitutional barrier

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[4] *See, e.g., Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985); *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257 (2d Cir. 1987); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 (8th Cir. 1982); *Denison v. SWACO Geolograph Co.*, 941 F.2d 1416, 1425-26 (10th Cir. 1991); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985). Only the District of Columbia Circuit has not addressed the issue.

insulating a judgment from review and correction of legal error.

The complete absence of any discussion of the Seventh Amendment in the proceeding below—as well as Petitioner's failure to preserve any Seventh Amendment issue—are themselves fatal to the Petition. But even had these issues been raised, they are wholly inapposite to the Court of Appeals' disposition of this case, as is evident from the contrast between the ruling below and the authorities that Petitioner contends (Pet. 7-9 & n.16) create the Seventh Amendment issue identified in *Grunenthal* and *Neese*.

Specifically, Petitioner's authorities stand for the unremarkable proposition that an appellate court should be wary of inferring that a trial court has erred in rejecting a weight-of-the-evidence challenge to a jury's determination of a disputed factual issue.[5] They acknowl-

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[5] *See, e.g., New York Central & Hudson River R.R. Co. v. Fraloff*, 100 U.S. 24, 31-32 (1879) ("our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."); *Southern Ry.-Carolina Division v. Bennett*, 233 U.S. 80 (1914) (where verdict "excess did not appear as a matter of law" but instead "upon the evidence," reexamination by this Court of the size of the verdict was improper, since "[t]he premises of the argument for the plaintiff in error were not conclusive upon the jury, and . . . no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."); *Texas & Pacific R.R. Co. v. Hill*, 237 U.S. 208 (1915) (following *Bennett*); *St. Louis, I.M. & S.R. Co. v. Craft*, 237 US. 648 (1915) (amount awarded for pain and suffering not open for reconsideration for excessiveness, as this issue involved a question of fact); *Phoenix Ry. Co. v. Landis*, 231 U.S. 578, 582 (1913) (where "[t]he argument, in substance, is that the verdict was without sufficient basis in the evidence," but where "[i]t cannot be said that there was no evidence to go to the jury[,] an objection that the verdict is against the weight of evidence or that damages allowed were excessive cannot be considered in this court"); *Herencia v. Guzman*, 219 U.S. 44 (1911) (same); *New York, Lake Erie & Western R.R. Co. v. Winter*, 143 U.S. 60 (1892) (this Court had no jurisdiction on

edge the obvious point that errors of law—expressly including a trial court's erroneous instructions, or, as here, a verdict in clear contravention of proper instructions—are not subject to this rule, whether on review of denial of a motion for new trial or otherwise. *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-84 (1933). Rather than suggesting, as does the Petition (Pet. 12-14), that a Court of Appeals cannot construe and consider the propriety of jury instructions and the jury's compliance with them, these cases typically preface their refusals to disturb a judgment below with a comment that, after careful review, the Court has determined that the jury was properly instructed. *E.g., Bennett*, 233 U.S. at 86; *Fraloff*, 100 U.S. at 30-33; *Lincoln v. Power*, 151 U.S. 436, 438 (1894).[6]

In this case, the Court of Appeals did not purport to determine that the weight of the evidence, as a matter of fact, showed the verdict to have been excessive. *Compare, e.g., Fairmount Glass*, 287 U.S. at 482-84 (noting that evidence was voluminous and conflicting, and that defendant had pleaded several defenses and a counterclaim, in refusing to disturb jury award as inadequate); *Fraloff*, 100 U.S. at 30-33 (noting, in rejecting attack on verdict

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writ of error to decide questions of fact, or consider the weight to be given to evidence properly admitted); *Wilson v. Everett*, 139 U.S. 616 (1891) (no review on writ of error of amount of verdict, where "[t]he case was fairly submitted to the jury, and the issues involved were passed upon by them"); *Wabash Ry. Co. v. McDaniels*, 107 U.S. 454 (1883) (court lacks authority to disturb damage award as excessive because "our power is restricted to the determination of questions of law arising upon the record").

[6] Petitioner's argument for deference to the district court's reading of the jury instructions (*e.g.*, Pet. 12, contending that "[t]he District Court was particularly well situated to recognize the meaning of its jury instructions, and to realize how the jury would have understood them") is especially inappropriate here, where the district judge who tried the case and instructed the jury has died and a new judge unfamiliar with the case was asked to rule on the post-trial motion.

as excessive, that "the evidence, in some of its aspects, placed the [amount of damages] very far in excess of [the] amount" awarded by the jury). Rather than engaging in the prohibited re-weighing of the facts, the Court of Appeals here simply determined that front pay damages were not available as a matter of law and that the portion of the verdict attributable to them accordingly could not stand.

Likewise, this case does not present the issue that Petitioner's authorities identify as problematic—*i.e.*, improperly inferring an error of law from a mere summary denial of a new trial motion. Here, the District Court in its post-trial ruling expressly held that the verdict was proper in including a front pay component. *See* Pet. App. 24a-26a. The Court of Appeals had every right to correct that legal error. *Compare, e.g., Fairmount Glass,* 287 U.S. at 482-84 (concluding that ruling denying motion for new trial on grounds of excessiveness would not be disturbed, since, *inter alia,* "the record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict").

Finally, Petitioner's attempt to find a Seventh Amendment issue in the Court of Appeals' reduction of the jury award (Pet. 16-22) fails for the same reason as her attack on that Court's authority to disturb the District Court's post-trial ruling: the Court of Appeals neither determined that the jury verdict was "excessive" as a matter of fact, nor did it order a "remittitur" on that basis. Instead, having concluded that the front pay component of the award was improper as a matter of law, the Court of Appeals disallowed it. Even the Courts of Appeals that Petitioner cites as finding Seventh Amendment concerns in an appellate court's remittitur of a verdict for excessiveness do not dispute that vacating damages that were improperly awarded as a matter of law is within the province of a Court of Appeals. *E.g., Phelan*

v. Local 305, 973 F.2d 1050, 1063 (2d Cir. 1992) ("Accordingly, the back pay award against Patrick Quinn should be set off in full [against earlier award of back pay to plaintiff] to prevent a double recovery"), *cert. denied*, 113 S. Ct. 1415 (1993). Since Petitioner failed to show the Court of Appeals that there was any dispute or question of fact concerning the portion of the verdict attributable to front pay, she can hardly complain that there has been any infringement of her right to have the amount of damages set by a jury. After all, the jury *did* set the amount of damages; the Court of Appeals merely eliminated the front pay component after ruling that it was legal error for the trial court to have authorized front pay.

In sum, this case does not present the Seventh Amendment questions that the Petition raises. Should the Court wish to address those issues, it will need the benefit of a record clearly presenting them. This is particularly so since, even by Petitioner's own admission, the Courts of Appeals at present see no constitutional impediment to reviewing, and setting aside, jury verdicts as excessive. *See* Pet. 12. The two cases on which Petitioner relies are both somewhat dated—*Neese* was decided in 1955; *Grunenthal* was decided in 1968—and this Court has not seen the need to revisit the issue since. *Grunenthal*, indeed, notes that, even at that date, "[a]ll 11 counts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." If such a widespread practice is to be reevaluated, it should be done on a clear record with the issues examined below. This case has no such record, and certiorari should be denied.[7]

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[7] It should be noted that the early decisions of this Court on which petitioner so heavily relies by no means necessarily demonstrate that a Seventh Amendment issue exists. These cases uniformly rely on the then-existing "writ of error" jurisdiction in

II. THE STANDARD APPLIED BY THE COURT OF APPEALS IN OVERTURNING THE OUTRAGE AWARD DOES NOT PRESENT AN ISSUE FOR THIS COURT

Petitioner alternatively suggests that this Court should grant certiorari to decide whether an appellate court engaging in review of the sufficiency of the evidence is bound by a legally erroneous jury instruction to which the defendant made no objection. Once again, Petitioner selects an issue not presented by this case.

Petitioner notes that the jury was instructed here that it could award damages for outrage if Respondent "by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to her." Pet. 22. She then complains that the Court of Appeals, in reversing the jury's decision, cited a requirement that, to show extreme and outrageous conduct, a plaintiff must establish that the defendant's conduct has gone "beyond 'all possible bounds of decency.'" Pet. 23. While Petitioner does not claim that the Court of Appeals applied the wrong state law standard, she does contend that that Court's formulation of the standard somehow deviated from the formulation used in the jury instruction.

As an initial matter, Petitioner plainly has not preserved this issue. Not only did she fail to object to the "bounds of decency" standard when Respondent referred to it in moving for j.n.o.v., and on appeal (*see* KFC's Reply Memorandum in Further Support of Motion for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial at 14; KFC's Brief 26)—Petitioner herself cited it approvingly before both the District Court and the Court of Appeals. *See* Plaintiff Betty Roush's

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holding that excessiveness is unreviewable. Only one or two even mention the Seventh Amendment, and those do not definitively decide that a Seventh Amendment problem exists. Moreover, the *Fairmount* opinion reflects an erosion of the rule of nonreviewability even under writ of error analysis.

Response to Defendant's Motion for Judgment Notwithstanding the Verdict and New Trial at 23-24; Petitioner's Brief 24.

Moreover, as Petitioner's own earlier adoption of the "bounds of decency" language demonstrates, there is no clear distinction between the two formulations. The mere fact that that language was not set forth in the jury instructions in no way establishes a discrepancy. *Cf. New York, Lake Erie & Western R.R. Co. v. Winter*, 143 U.S. 60 (1879) ("In fact, it is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language and meaning the same thing, tends rather to confuse than to enlighten the minds of the jury."). The Court of Appeals' discussion indicates that that Court, at least, viewed the two formulations of the legal standard as interchangeable, negating the possibility of any error in the ruling reversing the verdict on outrage. *See* Pet. App. 14a-16a. Indeed, the Court of Appeals' actual conclusion that insufficient evidence existed uses the precise language contained in the jury instruction. *See* Pet. App. 15a ("Even when considered in their totality, these actions do not amount to 'extreme and outrageous conduct' justifying imposition of liability for the tort of outrage in this case."). The issue that Petitioner seeks to raise is not presented on this record, and certiorari should be denied.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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